MONTANA
Management View

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STATE PERSONNEL DIVISION, DEPARTMENT OF ADMINISTRATION • ISSUE 6 • JULY 2002

Two-day furlough part of budget plan

State employees will take a two-day unpaid work furlough this year as part of a budget-balancing plan developed by Gov. Martz and her budget office. The budget office is drafting legislation for the upcoming special session to implement furloughs in all executive branch and legislative branch agencies, excluding the university system. The planned furloughs apply to general-fund and non-general-fund programs.

The budget office has a list of agencies and positions identified in the draft legislation. The State Personnel Division is preparing a set of questions and answers to help agencies and employees plan for the furloughs. The division will post the questions and answers on its web site within the next few days.

The plan is for employees to work with their supervisors in determining when they take the two days off between now and June 30, 2003. Supervisors will approve employees' requested dates in the same manner used for scheduling other types of leave, considering the needs of the business and the needs of the employees. In situations where agreement cannot be reached on the dates, management will schedule the furlough days, according to the draft legislation.

Highlights

The furloughs are part of a larger plan to reduce personal services spending this fiscal year. The budget office previously anticipated a four-day furlough might be necessary, but has revised the plan to two days off without pay. The personal services reductions include a planned hiring freeze and reductions in appropriations for the 4-percent state

employee pay raise that takes effect this year. Gov. Martz supports the pay raise and will not propose any reduction in it, but agencies will need to fund a greater share of the raise than previously anticipated by leaving vacant positions unfilled.

In addition to budget cuts of $38 million announced earlier this summer, state government must reduce spending further by $45 million dollars to meet statutory requirements based on current revenue projections. The total savings reached through furloughs, the hiring freeze and the reduction in the appropriation is estimated at roughly $6.6 million.

Budget cuts in the unionized workplace: Consider union contracts and bargaining obligations

Reducing positions or reducing work hours in the unionized workplace is sometimes more complicated than in the non-union workplace. Certain requirements of state policy or statute, such as the state reduction in work force policy, or the State Employee Protection Act, are often modified by specific language in union contracts. The goal of this *Management View* article is to alert managers to situations that may arise when cutting personal services budgets in the unionized workplace, and to encourage communication early and often between managers, personnel officers and labor relations staff in planning for such reductions. This article will address two cost-cutting situations: (1) work furloughs for reduced work hours, and; (2) reduction in force and layoffs.

Work furloughs

A work furlough is involuntary time off without pay for purposes of reducing personal services expenditures. Furloughs are generally implemented in some type of "across-the-board" manner, applying to work units that don't require scheduled staff coverage seven days a week, 24 hours a day. An example is the three-day furlough implemented in 1987 in the state Department of Justice. A projected revenue shortage prompted most state agencies to form budget-reduction plans, and the Department of Justice opted for furloughs. The department announced at the start of the fiscal year that employees would be required to take off, without pay, three particular Fridays during the upcoming year. The union grieved the furloughs (see page 8 of this issue in the "arbitration roundup") and also filed an unfair labor practice charge, but management's decision to implement furloughs was eventually sustained by two arbitrators, the Montana Board of Personnel Appeals and a state district court.

Management's analysis of how to implement furloughs in collective bargaining units should be made on a unit-by-unit, contract-by-contract basis. Managers, personnel officers and labor relations staff should review the contract language together, and also consider statutory collective bargaining obligations. As soon as management has an

idea or plan for furlough implementation, management's bargaining representatives should prepare to meet with the union's bargaining representatives to present the idea or plan. If there is no language in the union contract expressly prohibiting furloughs, then management can proceed toward furlough implementation under certain circumstances with respect to collective bargaining obligations. Contact your labor relations representative for more information about the circumstances and obligations (phone numbers are on the last page of this newsletter).

Reduction in force and layoffs

Reduction in force is a non-disciplinary layoff from employment prompted by reasons including, but not limited to, legislative mandate, lack of funds or elimination of programs. State government has a reduction-in-force policy and guide. The policy is at this web site location: http://www.discoveringmontana.com/doa/spd/css/Resources/3-0155.doc . The guide is at this web site location: http://www.discoveringmontana.com/doa/spd/css/resources/RIFGUIDE.doc. The policy and guide are good resources for administering a reduction in force, but managers in unionized workplaces should be aware that union contract provisions often supersede provisions of the policy and guide. Two areas where union contracts often supersede are the subjects of: seniority as a consideration selection of employees for layoff, and; advance notice requirements in a layoff situation.

Seniority

The policy says "employees will be retained giving consideration to skill and continuous length of service in state government." According to the policy, "skill should be applied first. If skill does not differentiate between employees, only then should length of service in state government be considered. The policy, however, does not apply to unionized employees covered by a contract that contains a seniority and reduction-in-force provision. A careful review of the seniority and reduction-in-force language of the contract is vital to selecting employees for layoff in the appropriate manner. There are two basic types of seniority provisions in union contracts. They are "strict seniority" and "modified seniority."

A contract with a strict seniority provision gives preference to the employee with the longest service without regard to any other considerations. An example of strict seniority layoff language is: "Layoffs caused by reduction in force shall be in order of seniority within the classification in which employed; that is, the employee last hired shall be the first released." This kind of language is common in contracts covering blue-collar craft units, 24-hour direct care and security facilities, and a number of other work units.

A contract with a modified seniority layoff provision is written to serve the basic aims of seniority, while recognizing other factors such as capabilities or qualifications. There are three basic categories of modified seniority provisions. They are the "relative ability" clause, the "hybrid" clause, and the "sufficient ability" clause.

A "relative ability" seniority clause provides, in essence, that a senior employee shall be retained over a junior employee if the senior employee possesses fitness and ability equal to that of junior employees. Several contracts in state government have this kind of language. An example (from the Department of Revenue contract): "If qualifications and capabilities are substantially equal, then seniority shall be the determining factor in the selection of employees for layoff within the same job classification." Management should have a sound evaluation tool or process in place to assess employees' abilities with respect to the program needs and job assignments that will be necessary after the reduction in force.

A "hybrid" seniority clause requires consideration and comparison of both seniority and relative ability. An example (from the Montana Public Employees Association Master Agreement) is: "Qualifications, seniority and capabilities shall be the controlling factors in selection of employees for layoff among positions of the same grade and class by geographic location, as identified in the supplemental agreements." Unless the contract specifically says so, this does not mean that each of the three considerations (qualifications, seniority and capabilities) must be equally weighted so each constitutes one-third of the decision. Arbitrators require, however, that fair and reasonable consideration be given to seniority and the relative ability factors. A sound evaluation tool or process for assessing the ability factors is important.

A "sufficient ability" seniority clause provides, in general, that the senior employee will be given preference if he or she possesses sufficient ability to perform the job. Minimum qualifications are enough to give the senior employment retention preference under a sufficient ability clause. This clause is similar to a strict seniority clause in that a senior employee (assuming the senior employee is minimally qualified) is entitled to retention preference over a junior employee with greater abilities and qualifications. The sufficient ability clause is rare in state government contracts, which mostly contain strict seniority, relative ability or hybrid seniority provisions.

Notice

The contract's notice provision for layoffs is an important consideration for managers, personnel officers and labor relations representatives in the planning stage. The reduction-in-force guide references the State Employee Protection Act which requires an employee and the employee's collective bargaining agent be notified in writing as soon as possible before the effective date of the layoff. The statute says if 25 or more employees are affected by an employing agency's reduction in force, notice must be provided at least 60 days before the anticipated layoff. If less than 25 employees will be affected, notice must be given at least 14 days before the anticipated date of the layoff. These statutory notice benefits represent the minimum notice to which employees and unions are entitled. Individual union contracts might place a greater burden of more advance notice on the employer, and also might require that the employer's bargaining representatives and union's bargaining representatives meet before implementing any layoffs. If a contract specifies a shorter notice than the statute provides, assume the

contract language pre-dates the statute and the statutory notice obligations supersede the contract.

State Employee Protection Act provides benefits to laid-off and reemployed workers

The State Employee Protection Act provides benefits to laid-off workers and preserves some rights and benefits for workers who are reemployed. It provides job training, special reemployment consideration, insurance, leave retention, and pay protection (if the employee is reemployed at the same grade level or higher than the one previously held). Unless noted otherwise, Protection Act benefits expire two years after the employee's effective date of layoff or two years from the date the employee completes job training provided under the Act, whichever is later. For more details, see the statutory provisions at http://data.opi.state.mt.us/bills/mca_toc/2_18_12.htm .

Managers should give employees and their bargaining agents information about the benefits of the State Employee Protection Act and the Retirement Service Purchase Program before anticipated date of the layoffs. See the reduction-in-force guide for sample notices, election forms, and an explanation of benefits at http://www.discoveringmontana.com/doa/spd/css/Resources/RIFGUIDE.doc. Managers, personnel officers and labor relations staff should review the language of the union contract. Negotiated provisions in union contracts often supersede or modify procedures found in policy or statute. Employees who are eligible to retire can opt for the "retirement service purchase program" instead of the layoff benefits under the State Employee Protection Act. At the time of layoff, the employee must elect in writing to receive either the State Employee Protection Act benefits or the Retirement Service Purchase benefits. The notice period gives the employee time to consider options. The election is irrevocable.

Here is a quick summary of State Employee Protection Act benefits for laid-off employees who do not opt for the retirement service purchase option:

Sick leave and annual leave credits

An employee may choose to receive a cash-out for all accrued leave, or retain leave credits until rights under the Protection Act expire, or use annual leave credits (not sick leave) to delay the termination date.

Insurance

A laid-off employee is covered by the health insurance plan and receives employer contributions toward premiums for six months after the layoff, or until the employee

becomes employed in a job that provides comparable insurance benefits, whichever comes first.

Consideration as an internal applicant

A laid-off employee is considered an internal applicant for vacancies in the agency from which the employee was laid off for one year from the effective date of layoff. The agency must put all laid-off employees on a mailing list and notify them of any vacant positions that they may be qualified to fill.

Job registry

Laid-off employees may voluntarily participate in a special "job registry," from which all agencies attempt to hire prior to seeking applications from the general public. Inclusion in the job registry does not give the laid-off employee a hiring preference. Rather, it means state agencies must consider the job registry applicant pool first. If no job registry applicants meet the qualifications of the job, then the job will be opened to the general public. An agency may require that job registry applicants participate in a competitive selection process. For example, an agency may require a structured oral interview, written test, physical test, or background and reference checks.

Notice of job vacancies

Laid-off employees are entitled to notice of announcements for which the employee may qualify that arise anywhere within state government. Notices must be provided for one year after the effective date of layoff. Each state agency must provide a copy of all vacancies for which the agency will conduct either simultaneous internal and job registry recruitment or external recruitment, except those positions exempted under 2-18-103 and 2-18-104, MCA, to the Helena Job Service. The Helena Job Service compiles and distributes notices to laid-off employees weekly.

Job retraining

The State Employee Protection Act guarantees employees access to any job retraining or career development programs provided by the state through the Workforce Investment Act dislocated worker programs, if employees begin participating within one year of effective date of layoff. Employees can obtain applications for training from the Helena Job Service.

Pay protection

An employee who is laid off and subsequently reemployed by a state agency is entitled to pay protection while covered by the Protection Act. The employee will earn the same hourly salary as previously received if the new position is at the same grade or higher as

the one previously held. If an employee is hired at a grade lower than the one previously held, the employee's pay is set using Pay Plan Rule 1812, Demotions. Accrued longevity increment hours are an exception. These hours and longevity pay are restored to a laid-off employee who is reemployed any time in the future. This benefit is not limited to the period of Protection Act coverage. However, the time in layoff status does not count toward longevity increments.

Relocation expenses

If a laid-off employee is rehired but must move to another geographic location, money may be available to defray the cost of the move. The employee can get applications and information specific to individual circumstances from any local Job Service Office.

Management should give the employee and the employee's bargaining agent written notice as early as possible before the layoff. Some collective bargaining agreements specify the notice requirements. If the bargaining agreement does not specify the notice requirements, the statutory requirement is 60 days before the anticipated date of layoff if the layoffs affect 25 or more employees. If the layoffs affect fewer than 25 employees, notice is required at least 14 days before the anticipated layoff. Some union contracts require earlier notice. Others do not. If a contract contains a notice period shorter than (or less than) the statutory requirements, management should probably follow the statutory requirements. For instance, if a contract says employees are entitled to a minimum 10 days notice before a layoff, management would be well advised to follow the statutory 14-day or 60-day notice (depending on the number of affected employees).

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Unpaid work "furlough"

A state budget crisis in 1986 and 1987 caused many agencies to make budget-cutting plans to cope with dismal revenue projections and collections. The Department of Justice decided one way to save money would be for employees to take three days off without pay, involuntarily, in Fiscal Year 1987. The days off without pay would be the same for all employees subject to the furlough – a Friday in November (the day after Thanksgiving), a Friday in December (the day after Christmas), and a Friday in April ("Good Friday"). Two separate grievances arose over the plan. The union advanced one grievance in the highway patrol bargaining unit, and another grievance in the motor vehicle registration bargaining unit. Management viewed the three days off without pay as a better alternative to layoffs. The union, however, claimed the three days without pay equated to layoffs because of the reduction in paid hours over the course of the fiscal year. The basis for the grievance, the union asserted, was management had implemented layoffs without following the seniority. The layoff provision in both contracts considered seniority to be a factor in layoffs.

The union also noted that the "regular workday" language in the contract defined a workday as eight hours, and the "regular workweek" was defined as "40 hours." Therefore, the union claimed, the workday and workweek provisions constituted a guaranteed minimum number of paid hours for employees. If management needed to cut hours, the union argued, the least-senior employees should have been permanently laid off. Finally, the union argued, management's plan to implement the unpaid furloughs constituted a "unilateral change" that was subject to bargaining.

Management argued the management rights provision of the contract authorized the employer to relieve employees from duty because of lack of funds and to determine the methods by which governmental operations are conducted, unless the authority is modified or waived in the union contract.

Arbitrator John Abernathy dismissed one of the grievances. He found the definition of a workday or a workweek in a contract is not a guarantee of hours unless the contract contains express language stating that the definition means a guarantee. Abernathy also found that three days off without pay, on a one-time basis, did not constitute a layoff and was within management's rights under the contract. Arbitrator Howell Lankford dismissed the other grievance on virtually the same basis. He found that a three-day furlough without pay was not a layoff. In regard to the union's charge that

the three-day leave was subject to bargaining, the arbitrator said such a claim was misdirected. If the union believed the employer had not met its duty to bargain, the arbitrator said, such a claim must be submitted to the Board of Personnel Appeals rather than to arbitration. The arbitrator said he had no authority to decide whether the state had bargained in good faith, because the Board enforces the bargaining statutes, while an arbitrator can only enforce specific language of collective bargaining.

Measuring employee capability in selection for layoff

An arbitrator in a 1982 case in the Department of Transportation (then the "Department of Highways") reversed management's selection of an employee for layoff. The contract contained a relative ability clause: "In selection of employees for layoff, when qualifications and experience are equivalent, seniority within each class of positions will be the determining factor." The Right-of-Way Bureau needed to lay off 25 employees across the state in 1982. In the Butte office, it meant one of three employees in the position "Right-of-Way agent II" had to be laid off. The three employees had to be skilled in property appraisal concepts as a requirement of holding the "agent II" position. Though none of the three had been promoted to "agent III" positions, two of the three had achieved one of the requirements for promotion to an "agent III" position, which was successful completion of a basic appraisal course. The one employee who had repeatedly failed the appraisal course happened to be the most senior of the three. The bureau chief in Helena selected the most senior of the three for layoff on the basis that, because he failed the appraisal course, he was less qualified than the other two employees. In 1982 there was not a written performance evaluation system in place in this work unit, and the evidence indicated the bureau chief did not discuss employee performance, qualifications or experience with the supervisor of the employees in the Butte office. Arbitrator Robert O'Neill deemed it significant that the supervisor of the three employees was unaware of the layoff decision by the bureau chief until after the employee was notified of the layoff. O'Neill reinstated the employee with back pay, ruling that the promotion criteria for the "agent III" position could not control the decision of which employees to retain in "agent II" positions, absent any other documented evidence that the employee who was laid off was inferior to the less-senior employees in terms of qualifications and experience necessary for an "agent II" position. "Where there is no performance evaluation system in effect, the recommendation of the supervisor in advance of the determination is more significant," O'Neil ruled. "An employer who wants ability to control layoffs should if possible have an objective system of measurement, since objective standards carry weight in arbitration."

An arbitrator in a 1998 case in the Department of Labor and Industry sustained the layoff of an employee who scored lower on a capabilities assessment than a junior employee who was retained. The contract contained a hybrid seniority clause: "Qualifications, seniority and capabilities shall be the controlling factors in selection of employees for layoff among positions of the same class code within geographic location." In anticipation of budget cuts, the department developed a competency-based measurement tool to assess employee capabilities in the event layoffs became necessary. Management notified the union of the tool and sought union feedback a

year before any layoffs were necessary. Budget cuts eventually forced the Flathead Job Service to select two employees for layoff from a group of 17 employees. In regard to qualifications, the employer considered all 17 employees to be equally qualified for the jobs they held at the time of the layoff. No employee had an advantage or disadvantage in terms of qualifications. In regard to seniority, the employer "scored" employees by crediting them with a half point for each month of continuous service since the last date of hire. For example, an employee with one year of service had six points, while an employee with 10 years of service had 60 points. In regard to capabilities, the employer rated employees on their proficiency in 14 employee competencies. Scoring for each competency was based on a system of zero points for "unacceptable," 200 points for "average" performance, and 300 points for "above-average" performance. The total score on all 14 competencies was divided by 14 to determine an average score for each employee. For each employee, the employer added the points from the seniority assessment to the average score from the capabilities assessment to arrive at a total score. The two lowest-scoring employees were selected for layoff. One of the two employees selected happened to have the least seniority in the group, meaning, he was 17th on the seniority list. The other employee selected for layoff, who was 15th on the seniority list, grieved his layoff on the basis that management retained a junior employee (the person who was 16th on the seniority list). The union alleged that management did not adequately consider seniority in the layoff decision. Arbitrator Jerry Thorn disagreed. "In this case, two persons must 'lose,'" Thorn observed. "Two layoffs will occur. If the instrument that determines who shall be laid off is designed to measure anything that cannot be absolutely quantified – such as seniority, for example – there is always a suspicion that the process can become more of a beauty contest than a cleanly objective analysis …. All of this does not, however, deal with the issue at bar: Was the collective bargaining agreement between the parties violated by the State when it laid off the Grievant? It is my finding and opinion that there was no violation."

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/css/

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